IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAMEL WASHINGTON and MIRA CHOROMANSKA, individually and on behalf of all other persons similarly situated, *Plaintiff,* v. SILVERLEAF RESORTS, INC., *Defendant.*	))))))))))))	Case No. 14-cv-03772 Judge Robert M. Dow Magistrate Judge Michael T. Mason JURY TRIAL DEMANDED

SECOND AMENDED COLLECTIVE AND CLASS ACTION COMPLAINT

The plaintiffs, Lamel Washington and Mira Choromanska, on behalf of themselves and a class of all those similarly situated, hereby presents this Collective and Class Action Complaint against defendant Silverleaf Resorts, Inc. for (a) its failure to pay regular wages and overtime (one and one-half times the regular hourly rate) for all hours worked in excess of forty per work week by individuals with the job title "OPC Agent," or who performed the same job duties as individuals with that job title, and other hourly paid employees (including face-to-face representatives, greeters and lead generators) in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, the Illinois Minimum Wage Law ("IMWL"), 820 ILCS 105 *et seq.*; and the Illinois Wage Payment and Collection Act ("IWPCA"), 820 ILCS 115 *et seq,* and, (b) its practice of automatically deducting meal breaks from OPC Agents' pay and other hourly paid employees (including face-to-face representatives, greeters and lead generators) without regard for whether they took such breaks and without a provision for allowing them to opt out of the deduction, also in violation of the FLSA, the IMWL and the IWPCA.

THE PARTIES

1. Defendant Silverleaf Resorts, Inc. ("Silverleaf") is a Texas corporation that regularly does business in the state of Illinois. Silverleaf is in the business of developing, marketing, selling, and operating vacation timeshares.

2. Silverleaf has 13 timeshare properties throughout the U.S., including one in Fox River, Illinois. Silverleaf also maintains business offices throughout the state of Illinois.

3. The plaintiff, Lamel Washington, is a resident of Chicago, IL. He worked for Silverleaf as an OPC Agent from July 2011 until May 2012.

4. The Plaintiff Mira Choromanska currently resides in Pompano Beach, Florida. She worked for Silverleaf as an OPC Agent in 2011 and 2012.

5. Each member of the putative class worked as an OPC Agent (or some similar title) or as an hourly paid employee (including face-to-face representative, greeter and/or lead generator) for Silverleaf within three years of the filing of this Complaint.

JURISDICTION AND VENUE

6. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331 and Section 16(b) of the FLSA, 29 U.S.C. § 216(b).

7. This Court also has original jurisdiction over this action under the Class Action Fairness Act, 28 U.S.C. § 1332(d), because this is a class action in

which (a) there are 100 or more members of the proposed class; (b) at least some of the members of the proposed class have a different citizenship than the defendant; and (c) the claims of the proposed class members exceed $5,000,000 in the aggregate.

8. The Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a).

9. The Northern District of Illinois has personal jurisdiction over the defendant because it does business in Illinois and maintains offices in this District, including, but not limited to, Lombard, IL and Schaumburg, IL.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because the defendant resides in this district, under the definition set forth in 28 U.S.C. § 1391(c), and because a substantial part of the events or omissions giving rise to the claims occurred in this District.

FACTUAL BACKGROUND

11. Mr. Washington, Ms. Choromanska and the putative class members are/were employed by Silverleaf as OPC Agents (or performed the same job duties as individuals with that job title) and as other hourly paid employees in other classifications (including face-to-face representatives, greeters and lead generators).

12. They are assigned by Silverleaf to work in kiosks set up by Silverleaf in specific locations (like malls, amusement parks, and other places where potential customers can be found).

13. OPC agents' duties include booking appointments with potential buyers of timeshares to visit the timeshare locations. Face-to-face representatives, greeters, lead generators also performed marketing-related functions and were compensated on a similar basis as OPC agents.

14. Mr. Washington, Ms. Choromanska and the putative class members were paid an hourly rate ($10.00 per hour for Mr. Washington) and/or a non-discretionary commission for each person who attended a presentation and each person who bought a timeshare and made the first payment.

15. Mr. Washington, Ms. Choromanska and the putative class members regularly worked more than 40 hours per week but were not paid overtime on those hours over 40 as required by the FLSA and the IMWL.

16. Mr. Washington, Ms. Choromanska and the putative class members were prohibited by Silverleaf management from reporting hours that they worked in excess of 40 per week on their timesheets, and/or from reporting regular hours in excess of their scheduled work time.

17. For a portion of the class period, OPC Agents and other hourly paid employees (including face-to-face representatives, greeters and lead generators) kept track of their time by writing their hours on timesheets. For a later portion of the class period, OPC Agents and other hourly paid employees (including face-to-face representatives, greeters and lead generators) logged their hours on a smartphone app.

18. Silverleaf managers told Mr. Washington, Ms. Choromanska and the putative class members not to record their hours over 40 and that they would not be paid for any time worked over 40 hours per week. Mr. Washington, Ms. Choromanska and the putative class members were also regularly prohibited from reporting regular hours worked in excess of their scheduled time.

19. If Mr. Washington, Ms. Choromanska and the putative class members did record hours in excess of 40 or in excess of their scheduled times, they were told to change their time records and re-submit them, or management changed the time records.

20. After the smartphone app was implemented, managers had access to and changed Mr. Washington's, Ms. Choromanska's and putative class members' hours to eliminate all hours over 40 per week, and/or to reduce recorded time to scheduled hours.

21. Silverleaf automatically deducted a half-hour meal break from each OPC Agent who worked at least 6 hours in a given day, and a one-hour meal break from each OPC Agent who worked at least 8 hours, regardless of whether that OPC Agent actually took a meal break at all or took a break of that duration.

22. Mr. Washington, Ms. Choromanska and the putative class members regularly took no meal breaks or very short meal breaks.

23. Silverleaf had no procedure by which Mr. Washington, Ms. Choromanska and putative class members could override these automatic

deductions for meal breaks or report that they did not take meal breaks (or took shorter meal breaks).

24. Defendant agreed to compensate Plaintiffs on a "time basis" of calculation based on the following formula: hours worked times hourly rates. Plaintiffs' hourly rates were generally $10/hr. Defendant agreed to pay Plaintiffs overtime for hours over forty at a rate of time and one-half Plaintiffs' hourly rate.

25. If Plaintiffs' earned commissions or production bonus exceeded their hourly wages, then Defendant agreed that Plaintiffs would receive their commissions or production bonus instead of their hourly wages.

26. Defendant breached this agreement by failing to pay Plaintiffs for all their work time.

27. When Defendant did pay overtime, it failed to include non-discretionary earned bonuses in computing the employees' regular and overtime rates of pay, as required by State and Federal law.

FIRST CLAIM FOR RELIEF
FAIR LABOR STANDARDS ACT, 29 U.S.C. §§ 201 *et seq.*
Individually and on behalf of the putative class

28. The plaintiffs re-allege each of the paragraphs set forth above.

29. Mr. Washington brings Count I of this action pursuant to 29 U.S.C. 216(b)'s collective action provisions on behalf of a collective defined as follows:

> All persons who have been employed at Silverleaf as OPC agents, lead generators, greeters, face-to-face agents, and/or other similar positions at anytime from May 2011 through and including the present and until final resolution of the case, and who have not been paid the statutory minimum wage for all regular hours worked, or overtime wages at the rate of one and

one half times their regular rate (as defined by the FLSA) for all the time worked over 40 hours in individual work weeks.

30. On information and belief, the putative class members nationwide number in at least the several hundreds and probably in excess of 1,000. As such, a collective action is the most efficient mechanism for resolving the claims of the FLSA opt-in class.

31. With respect to unpaid overtime, the members of the FLSA opt-in class are similarly situated because they perform similar job functions relating to the marketing of timeshare products, were compensated on an hourly (or commission) basis and regularly were not paid for all of their work time due to the above described policies. Additionally, when overtime was paid, members of the opt-in class were paid at less than the required time and one-half rate of pay due to the Company's failure to include non-discretionary bonuses when it computed the regular and overtime rates of pay.

32. With respect to meal breaks, the members of the FLSA opt-in class are similarly situated because they all perform the same basic duties as OPC Agents and they are all subject to Silverleaf's policy of automatically deducting meal breaks without regard for whether breaks were taken or for how long.

33. Mr. Washington, Ms. Choromanska and the putative class members are/were "employees" for the purposes of 29 U.S.C. § 203(e).

34. Silverleaf is/was an "employer" of Mr. Washington, Ms. Choromanska and the putative class members for the purposes of 29 U.S.C. § 203(d).

35. Mr. Washington, Ms. Choromanska and the putative class members are/were not "outside salespeople" for the purposes of 29 U.S.C. § 213(a)(1) because they are/were assigned to work at fixed sites by Silverleaf and are/were not "customarily and regularly engaged away from the employer's place or places of business."

36. Mr. Washington, Ms. Choromanska and the putative class members are/were not exempt from the FLSA's overtime provisions for any other reason.

37. Silverleaf is/was aware of the duties performed by Mr. Washington, Ms. Choromanska and the putative class members, that they were not exempt from the FLSA's overtime provisions, and that it had an obligation to pay them at least minimum wage for all regular hours and overtime at a rate of time and one-half for hours worked over 40, and to provide a procedure for them to override the automatic meal-break deduction.

38. The FLSA requires every covered employer, including Silverleaf, to compensate all nonexempt employees at a rate of not less than one and one-half times the regular rate of pay for work performed in excess of 40 hours per workweek, to otherwise pay for all hours worked, and to provide a procedure for employees to override any automatic deductions for meal breaks that were not taken or were partially-taken. The FLSA requires that the regular rate of pay include all remuneration for employment paid to or on behalf of the employee, including non-discretionary bonuses and commissions.

39. Mr. Washington, Ms. Choromanska and the putative class members are/were regularly uncompensated for hours that they actually worked due to Silverleaf's policies.

40. As such, Silverleaf violated the FLSA in its failure to pay Mr. Washington, Ms. Choromanska and the members of the FLSA opt-in class the required compensation for hours worked.

41. Further, by failing to record, report and/or preserve records of the actual hours worked by the plaintiffs and the FLSA opt-in class members, and/or by requiring the class to alter their time records and/or altering the records itself, Silverleaf has failed to make, keep and preserve records sufficient to determine these employees' wages, hours and other conditions of employment, in violation of the FLSA.

42. Silverleaf's violation of the FLSA is willful, repeated and intentional.

43. Mr. Washington, Ms. Choromanska and the putative class members are/were harmed by Silverleaf's actions.

44. By the filing of this Collective and Class Action Complaint, Mr. Washington and Ms. Choromanska hereby give their consent to sue under the FLSA, 29 U.S.C. § 216(b). It is anticipated that upon notice, or otherwise, additional similarly-situated individuals will sign Consent to Sue forms and join as plaintiffs in the future.

45. The class should be conditionally certified and notice should be promptly provided to the FLSA opt-in class as provided by the above section.

46. The names and addresses and, if possible, email addresses of the FLSA opt-in class members should be made available from Silverleaf's employment records and notice should be made by First Class Mail, email, and posting in the offices in which the class members work as soon as feasible.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs, Lamel Washington and Mira Choromanska, on behalf of themselves and the FLSA opt-in class, pray for relief as follows:

A. Designation of this action as a collective action on behalf of the FLSA opt-in class and issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated members of the FLSA opt-in class apprising them of the pendency of this action, and permitting them to assert timely FLSA claims in this action by filing individual Consent to Sue forms pursuant to 29 U.S.C. 216(b);

B. Designation of the plaintiffs, Lamel Washington and Mira Choromanska, as the representatives of the FLSA opt-in class;

C. A declaratory judgment that the practices that form the basis for this count of the complaint are unlawful under the FLSA;

D. An award of compensatory and statutory damages, including liquidated damages;

E. Costs of the action incurred, including expert fees;

F. Attorneys' fees, including fees pursuant to 29 U.S.C. § 216;

G. Pre- and post-judgment interest; and

H. All other relief, whether equitable or legal, as this Court deems necessary, just and proper.

SECOND CLAIM FOR RELIEF
ILLINOIS MINIMUM WAGE LAW, 820 ILCS 105 *et seq.*
Individually and on behalf of the putative class

47. The plaintiffs reallege each of the paragraphs set forth above.

48. Mr. Washington and Ms. Choromanska bring Count II of this action pursuant to Federal Rule of Civil Procedure 23 on behalf of themselves and a putative class of Silverleaf employees defined as follows:

> all persons who have been employed at Silverleaf in Illinois as OPC agents, lead generators, greeters, face-to-face agents, and/or other similar positions at anytime from May 2011 through and including the present and until final resolution of the case, and who have not been paid the statutory minimum wage for all regular hours worked, or overtime wages at the rate of one and one half times their regular rate for all the time worked over 40 hours in individual work weeks.

49. The IMWL provides that "no employer shall employ any of his employees for a workweek of more than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1 1/2 times the regular rate at which he is employed." 820 ILCS 105/4a(1).

50. The IMWL further requires that employers pay employees for all hours worked at a rate not less than the statutory minimum wage. 820 ICLS 105/4. The IMWL, like the FLSA, requires that commissions must be included in computing the employee's overtime and regular rates of pay. 56 Ill.Admin.Code 210.430.

51. The IMWL further provides that "[i]f any employee is paid by his employer less than the wage to which he is entitled under the provisions of this Act,

the employee may recover in a civil action the amount of any such underpayments together with costs and such reasonable attorney's fees as may be allowed by the Court, and damages of 2% of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid." 820 ILCS 105/12(a).

52. Mr. Washington, Ms. Choromanska and the putative class members are/were "employees" for the purposes of 820 ILCS 105/3(d).

53. Silverleaf is/was an "employer" for the purposes of 820 ILCS 105/3(c).

54. Mr. Washington, Ms. Choromanska and the putative class members are/were not "outside salesmen" for the purposes of 820 ILCS 105/3(d)(4) because they are/were assigned to work fixed sites by Silverleaf.

55. Mr. Washington, Ms. Choromanska and the putative class members are not exempt from the IMWL for any other reason.

56. Mr. Washington, Ms. Choromanska and the putative class members are/were regularly uncompensated for hours that they actually worked due to Silverleaf's policies.

57. Silverleaf is/was aware of the duties performed by Mr. Washington, Ms. Choromanska and the putative class members, that they were not exempt from the IMWL's overtime provisions, and that it had an obligation to pay them overtime for hours worked over 40 and to provide a procedure for them to override the automatic meal-break deduction.

58. As such, Silverleaf violated the IMWL in its failure to pay Mr. Washington, Ms. Choromanska and the members of the Rule 23 class the required compensation for hours worked. Silverleaf's violation of the IMWL is/was willful, repeated and intentional.

59. Mr. Washington, Ms. Choromanska and the putative class members are/were harmed by Silverleaf's actions.

60. The Rule 23 class is so numerous that joinder of all members if impracticable. On information and belief, the class numbers in the hundreds.

61. There are questions of law or fact common to the class, including, but not limited to, whether Silverleaf failed and continues to fail to pay overtime for hours worked in excess of 40 per week and whether Silverleaf automatically deducted meal breaks without providing employees with a method of being paid for breaks that were not taken.

62. Mr. Washington's and Ms. Choromanska's claims or defenses are typical of the claims or defenses of the Rule 23 class. They, like the other Rule 23 class members, were subject to Silverleaf's policy of failing to pay overtime for hours worked in excess of 40 per week and automatically deducting meal breaks without regard for accuracy, and of paying overtime which it did recognize as worked at the incorrect rate of pay.

63. Mr. Washington and Ms. Choromanska will fairly and adequately protect the interests of the Rule 23 class. They have retained counsel competent and experienced in complex class actions and the types of claims alleged herein.

64. Class certification may appropriate under F.R.C.P. 23(b)(1) because prosecuting separate actions by or against individual class members would create a risk of (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the defendant; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

65. Class certification may also be appropriate under F.R.C.P. 23(b)(2) because the defendant has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

66. Class certification is appropriate under F.R.C.P. 23(b)(3) because the questions of law or fact common to class members predominate over any questions affecting only the plaintiff, and because a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs, Lamel Washington and Mira Choromanska, on behalf of himself and the Rule 23 class, prays for relief as follows:

A. Certification of this action as a class action pursuant to Fed. R. Civ. P. 23 under the appropriate section(s) on behalf of the Rule 23 class.

B. Designation of the plaintiffs, Lamel Washington and Mira Choromanska, as the representative of the Rule 23 class;

C. A declaratory judgment that the practices that form this complaint are unlawful under the IMWL;

E. All underpayments due to the Rule 23 class;

F. Damages in the amount of 2% of the amount of such underpayments for each month that they were not paid;

H. Costs of the action incurred, including expert fees;

I. Attorneys' fees;

J. Pre and post-judgment interest; and

K. All other relief, whether equitable or legal, as this Court deems necessary, just and proper.

THIRD CLAIM FOR RELIEF
ILLINOIS WAGE PAYMENT AND COLLECTION ACT, 820 ILCS 115/1 *et seq.*
Individually and on behalf of the putative class

67. The plaintiffs reallege each of the paragraphs set forth above.

68. Mr. Washington and Ms. Choromanska bring Count III of this action pursuant to Federal Rule of Civil Procedure 23 on behalf of themselves and a putative class of Silverleaf employees defined as follows:

> all persons who have been employed at Silverleaf in Illinois as OPC agents, lead generators, greeters, face-to-face agents, and/or other similar positions at anytime from May 2004 through and including the present and until final resolution of the case, and who have not been paid at their regular rate of pay for all regular hours worked, or overtime wages at the rate of one and one half times their regular rate for all the time worked over 40 hours in individual work weeks.

69. The IWPCA requires an employer to timely and completely pay employees their earned wages and/or final compensation. 820 ILCS 115/4, 820 ILCS 115/5.

70. Wages are defined as any compensation owed an employee by an employer pursuant to a contract or agreement, whether the amount is determined on a time, task, piece or other basis of computation. 820 ILCS 115/3.

71. Mr. Washington, Ms. Choromanska and the putative class members are/were "employees" for the purposes of 820 ILCS 115/3.

72. Silverleaf is/was an "employer" for the purposes of 820 ILCS 115/3.

73. Silverleaf agreed to compensate Mr. Washington, Ms. Choromanska and the putative class on a time basis of calculation, i.e., hours worked times hourly rates. In weeks in which earned commissions or production bonuses exceeded hourly wages, Silverleaf agreed to compensate Mr. Washington, Ms. Choromanska and the putative class based on their earned commissions or production bonuses.

74. Mr. Washington, Ms. Choromanska and the putative class members are/were regularly uncompensated for regular and overtime hours that they actually worked due to Silverleaf's policies. As such, Silverleaf breached its agreement to compensate Plaintiffs on a time basis (hours worked times hourly rates), in the event that their earned wages exceeded commissions.

75. Silverleaf is/was aware of the unpaid work performed by Mr. Washington, Ms. Choromanska and the putative class members, and that it had an obligation to pay them their earned wages pursuant to the IWPCA.

76. As such, Silverleaf violated the IWPCA in its failure to pay Mr. Washington, Ms. Choromanska and the members of the Rule 23 class the required and agreed upon compensation.

77. Silverleaf's violation of the IWPCA is/was willful, repeated and intentional.

78. Mr. Washington, Ms. Choromanska and the putative class members are/were harmed by Silverleaf's actions.

79. The Rule 23 class is so numerous that joinder of all members if impracticable. On information and belief, the class numbers in the hundreds.

80. There are questions of law or fact common to the class, including, but not limited to, whether Silverleaf failed and continues to fail to pay regular and overtime wages earned by Mr. Washington, Ms. Choromanska and the class.

81. Mr. Washington's and Ms. Choromanska's claims or defenses are typical of the claims or defenses of the Rule 23 class. They, like the other Rule 23 class members, were subject to Silverleaf's policy of failing to pay regular and overtime wages.

82. Mr. Washington and Ms. Choromanska will fairly and adequately protect the interests of the Rule 23 class. They have retained counsel competent and experienced in complex class actions and the types of claims alleged herein.

83. Class certification may appropriate under F.R.C.P. 23(b) because prosecuting separate actions by or against individual class members would create a risk of (A) inconsistent or varying adjudications with respect to individual class

members that would establish incompatible standards of conduct for the defendant; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

84. Class certification may also be appropriate under F.R.C.P. 23(b)(2) because the defendant has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate for the class as a whole.

85. Class certification is appropriate under F.R.C.P. 23(b)(3) because the questions of law or fact common to class members predominate over any questions affecting only the plaintiff, and because a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff, Lamel Washington and Mira Choromanska on behalf of themselves and the Rule 23 class, prays for relief as follows:

A. Certification of this action as a class action pursuant to Fed. R. Civ. P. 23 under the appropriate section(s) on behalf of the Rule 23 class.

B. Designation of the plaintiffs, Lamel Washington and Mira Choromanska, as the representatives of the Rule 23 class;

C. A declaratory judgment that the practices that form this complaint are unlawful under the IWPCA;

E. All underpayments due to the Rule 23 class;

F. Damages in the amount of 2% of the amount of such underpayments for each month that they were not paid;

H. Costs of the action incurred, including expert fees;

I. Attorneys' fees;

J. Pre and post-judgment interest; and

K. All other relief, whether equitable or legal, as this Court deems necessary, just and proper.

JURY DEMAND

The plaintiffs demand a trial by jury on all issues raised in the foregoing Amended Collective and Class Action Complaint for which a jury trial is available.

Respectfully submitted,

/s/ Robin B. Potter
One of Plaintiffs' Attorneys

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFF'S SECOND AMENDED COMPLAINT** was served upon all parties through the Court's CM/ECF system on March 18, 2015 upon the below addresses:

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